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IN THE SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1956

No. ~~617~~ 106

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

BRIEF OF RESPONDENT

Opposing Petition For Writ Of
Certiorari By
Denver Union Stock Yard Company

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IN THE SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1956

No. 917

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

BRIEF OF RESPONDENT

Opposing Petition For Writ Of
Certiorari By
Denver Union Stock Yard Company

QUESTION PRESENTED

A single question, only, is presented:[1]

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1. Respondent re-states the Question Presented, being "dissatisfied with (its) presentation by the other side". Rule 40(3).

"Is the Regulation here on trial, which was issued by Denver Union Stock Yard Company (a public utility[2]) illegal upon its *face* as a matter of law?"

The Court of Appeals held it was.

NOTE: The Regulation was *not issued or prescribed* by the Secretary or Department of Agriculture. They had no part whatever in its origin. It was issued by the Stock Yard.

The only part played by the Secretary or Department of Agriculture came *afterward* when Respondent (a "market agency") lodged a complaint (R. 40) with the Department of Agriculture against Petitioner (the Stock Yard Company) as permitted by the Packers & Stockyards Act (7 U.S.C. §210) charging the Regulation by the Stock Yard Company was illegal *per se*. The Department's Judicial Officer dismissed (R.33), but the Court of Appeals reversed, holding the Regulation to be void upon its *face* as a matter of *law*. (Petition for Certiorari, Appendix 8a.) 241 F. 2d 192.

Petitioner's presentation of the question in such self-evident negatives as being whether the Court of Appeals "could assume facts not in the record" or "invade the statutory discretion of the Secretary" (Petition for Certiorari, Page 3) will not do. The *Court* looked squarely at the Regulation and found it illegal upon its *face*. No facts were necessary, *assumed or not assumed*. The Stock Yard Company's handiwork was simply void, in and of itself. The Secretary has not employed or refused to employ discretion. And

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2. *Stafford* vs. *Wallace* (1922) 42 S. Ct. 397, 258 U.S. 495. 23 A.L.R. 229.

when the Regulation collapsed of its own illegal force, it followed — had to follow — that the Stock Yard Company was not to be permitted to enforce it. And that exactly was the resulting order of the Court of Appeals. The Regulation was pronounced a *nullity;* and no discretion can be claimed from a resulting nullity.

The simple fact and situation is: This shocking Regulation issued by the Stock Yard Company has travelled a tortuous trail, finally coming to its own end. Respondent (complainant before the Secretary) there avowed that it stood squarely on the legal proposition that the Regulation was totally void upon its face. So it filed its "Election to Rest", relying wholly upon the law.[3] Petitioner, the Stock Yard Company (Respondent before the Secretary) then *also chose the law* as the sole deciding factor. For it promptly filed its "Motion to Dismiss", asserting therein that Respondent (complainant there) had failed —

> "to sustain the burden of making a prima facie case in support of its complaint *as evidenced by its election not to offer proof*" etc. (R. 74).

Thus, both sides called for a decision on the Regulation's validity or invalidity as a matter of law, *only.* Respondent did so by its "Election to Rest". Petitioner, by its "Motion to Dismiss". The Judicial Officer decided on the Regulation squarely as a matter of *law.* He held it was not invalid on its face. The Court of Appeals also decided on the Regulation as a matter

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3. "Complainant's Election to Rest" put the Regulation squarely to test as being illegal on its face as a matter of law, declaring the taking of evidence could have no part in determining a *law* matter. (R. 73).

of *law*. It unanimously ruled the Regulation *was* invalid in *law* upon its *face*.

So, Petitioner (itself) and Respondent both called upon the Judicial Officer of the Department of Agriculture for a decision on the Regulation's validity or invalidity as a matter of law; the latter by its "Election to Rest", the former by its "Motion to Dismiss" the complaint. The Judicial Officer decided — as a matter of law, and the Court of Appeals decided — also as a matter of law; the question — only question — each time being as presented at the outset herein:

> "Is the Regulation here on trial, which was issued by Denver Union Stock Yard Company (a public utility) illegal upon its *face* as a matter of law?"

STATEMENT OF THE CASE

In 1955 Petitioner, Denver Union Stock Yard Company, announced:

> "If you engage in business at this stockyard, you cannot engage in business in the country, or elsewhere, in Colorado (except approximately the East one-sixth thereof designated by County lines and highways) other than to route livestock to us."

That, in effect, is what the Stock Yard Company declared in its Regulation 10(c) of "Tariff No. 14" May 11, 1955 filed with the Secretary of Agriculture and addressed to "market agencies" (firms like Respondent — commission firms) and "dealers" (who buy and sell for themselves) and other persons operating on the Denver Stock Yard.

A private company may prescribe at will the conditions on which it will deal or *refuse* to deal with anyone. But not so the Denver Union Stock Yard Company. Why? Because of the Packers & Stockyards Act 1921 which makes a "posted stockyard"[4] a *public utility.*[5]

> "The (Packers & Stockyards) Act, therefore, treats the various stockyards of the country as *great national public utilities*". (Parentheses and emphases supplied.) *Stafford* vs. *Wallace* (1922) 42 S. Ct. 397, 402.

The Packers & Stockyards Act provides:

> "It shall be the duty of every stockyard owner

4. Petition for Certiorari, Page 4. A "posted" stockyard is one which the Secretary of Agriculture has declared to be a "public market". 7 U.S.C. §202.

5. *Stafford* vs. *Wallace* (1922) 42 S. Ct. 397. 258 U.S. 495. 23 A.L.R. 229.

and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard . . ." 7 U.S.C. §205.

"It shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U.S.C. §208.

Thus, the Stock Yard Company is commanded to (1) furnish stockyard services at its stockyard without discrimination, and, (2) establish and observe nondiscriminatory *regulations* and practices, discriminatory regulations being denounced as unlawful.

Nevertheless, the Stockyard Company owners, May 11, 1955, issued the Tariff and Regulation here on trial, declaring that all "market agencies", "dealers" and "other persons" engaging in business at this stockyard were *prohibited* from engaging in any of the following livestock activities in substantially the entire State of Colorado (except the East 1/6th):

(1) Soliciting business for other markets, — or for sale at outside feed yards, — or at country points.

(2) Diverting or attempting to divert livestock from this market which would otherwise come to the Denver Stock Yard.

(3) Engaging in any practice to interfere with the "normal" flow of livestock to the Denver Stock Yard.

Then followed a self-defined area prohibited to the "market agencies", "dealers" and "other persons" described by the Regulation as being

"all of the State of Colorado" except (approximately the East 1/6th thereof) outlined by designated boundaries and County highways. R. 3. 40-41. Petition for Certiorari, 2a, 11a. Opinion below, 241 F. 2d 194.

NOTE: The Regulation bars all market agencies, dealers, and other persons admitted on the Denver stockyard from soliciting or doing business or trading at all within the forbidden country area — substantially all of Colorado — *except* to route livestock to the Denver stockyard. It says those who handle livestock in that area must see that all stock handled by them moves to the Denver stockyard or they must get off of that yard and stay off.[6]

So Respondent (as a market agency operating at the Denver stockyard and other yards and in the country throughout the West) challenged the Regulation and filed its complaint with the Secretary of Agriculture. (R. 40) It set out that the stockyard was a public utility under the Packers & Stockyards Act, was, therefore, under duty to furnish stockyard services without discrimination[7] and the Regulation was discriminatory and should be set aside as unlawful, pointing out that its demand was no different than the demand of:

— A railroad which would deny service to a shipper who also shipped by truck.

— An airline which would deny service to passengers who also travel by rail.

— A power company which would deny service to one who also uses gas.

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6. As the Court of Appeals remarked, Respondent was "facing expulsion from the Denver yard" if it failed to abide the Regulation. 241 F 2d 195. Petition for Certiorari, 4a.

7. 7 U.S.C. §205.

> — A water company which would deny service to one who also receives water from a spring or purchases bottled water from another supplier . . . etc., etc. (R. 42.)

The Stock Yard Company answered, defending and asserting its right to so regulate. A "hearing examiner" made an "Interim Ruling", saying he thought a hearing should be set, and setting one. (R. 72). But, Respondent thought and claimed the matter was solely one of law — it always was.

So, at that point, Respondent filed its "Election to Rest" upon the Regulation's invalidity as a matter of *law* on its *face*. (R. 73). Petitioner also stood. It filed its "Motion to Dismiss" the complaint for Respondent's not having "sustained the burden of making a prima facie case as evidenced by its election not to make proof". (R. 74). Briefs and argument followed. The Order and Decision of the Judicial Officer (in the Department of Agriculture) dismissed the complaint. (R. 33). Respondent appealed to the Tenth Circuit Court of Appeals. The latter reversed, holding the Regulation to be "invalid upon its face". (241 F. 2d 197. Petition for Certiorari, 8a). The Stock Yard Company seeks review in this Court.

As we will see hereafter, the decision of the Court of Appeals was correct. The Regulation is invalid on its face. That is the sole question presented, as this brief showed in its opening pages.

ARGUMENT

1.

Denver Union Stock Yard Company Is A Public Utility.

As we have seen, the Packers and Stockyards Act 1921 provides:

> "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard . . . " 7 U.S.C. §205.

> "It shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U.S.C. §208.

Promptly after the Act went into effect, this Court sustained its constitutionality. *Stafford* vs. *Wallace* (May 1, 1922) 258 U.S. 495. 42 S. Ct. 397. 23 A.L.R. 229. This court held the business of the various stockyards of the country was affected with the public interest, which made them public utilities under the Act:

> "The Act, therefore, treats the various stockyards of the country as *great national public utilities* to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion." 42 S. Ct. 397, 402. (Italics added).

That made the "public-utility" feature final everywhere.[8] State and Federal courts abide:

Birmingham vs. *Rice Bros.*, 238 Iowa 410, 26 N.W. 2d 39, 2 A.L.R. 2d 1108. Cert. Den. 68 S. Ct. 151.
Kirk vs. *St. Joseph Stockyards Company*, 8 Cir. 206 F. 2d 283, 40 A.L.R. 2d 981.
Blackwell vs. *Laird* (Mo.) 163 S.W. 91.
Sullivan vs. *Wells* (D.C. Neb.) 89 F. Supp. 317.
Montana Meat Company vs. *Missoula Livestock Auction Company* (Mont.) 230 P. 2d 955.

Market agencies (Respondent is one) are public utilities, no less than the stockyards, for the Act requires them also to furnish stockyard services (buying and selling livestock on commission for others) "without discrimination" and to establish "non-discriminatory regulations"[9]. The public utility character of the stockyards and market agencies is acknowledged everywhere by the courts.

Birmingham vs. *Rice Bros.*, supra.
Citizens State Bank vs. *Farmers Union Livestock Coop.* (Kan.) 193 P. 2d 636.
Mason City Production Credit Assn. vs. *Sig Ellingson Company* (Minn.) 286 N.W. 713.
First National Bank vs. *Siman* (S.D.) 289 N. W. 416.
Moderie vs. *Schmidt* (Wash.) 108 P. 2d 331.
Walker vs. *Caviness* (Tex.) 256 S.W. 2d 880.
Kelly vs. *Lang* (N.D.) 62 N.W. 2d 770.

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8. The editors of A.L.R. made this simple annotation on the subject: "Note. The decision in the reported case (*Stafford* vs. *Wallace*) being the final authority upon the specific questions therein considered, renders annotation unnecessary". 23 A.L.R. 243.

9. 7 U.S.C. §205. §208.

Allen C. Driver, Inc., vs. *Wells* (Md.) 86 A. 2d 724.
Seymour vs. *Austin* (D.C. Ore.) 101 F. Supp. 915.
Johnson vs. *Robinson* (5 Cir.) 203 F. 2d 135.
Sig Ellingson Company vs. *Butenbach* (8 Cir.) 199 F. 2d 679. Cert. Den. 73 S. Ct. 505.

2.

Denver Union Stock Yard As A Public Utility Is Under Duty To Furnish Stockyard Services To Respondent And Others Without Discrimination.

43 Am. Jur. Public Utilities §22:

> "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders . . . the public utility is under a legal obligation to render adequate and reasonably efficient service impartially, without unjust discrimination . . . to all members of the public to whom its public use and scope of operation extend who apply for such service and comply with the reasonable rules and regulations of the public utility."

The duty is a common law obligation aside from any statute.[10]

Stockyard companies are just like other public utilities as regards their duty to serve. Note the following statement by the 8th Cir. Judges in *Kirk* vs. *St. Joseph Stockyards Company*, 206 F. 2d 283:

> "Defendent as the owner and operator of a commercial stockyard which was a public utility subject to reasonable regulations, had the duty of furnishing, upon reasonable request, without discrimination, reasonable stockyard service and to establish, observe and enforce just, reasonable and non-discriminatory regulations and practices in respect to the furnishing of stockyard service. Packers & Stockyards Act of 1921, 7 U.S.C. §201 et seq."

Denver Union Stock Yard Company is a public utility and must, therefore, furnish stockyard services to Petitioner and other market agencies and dealers.

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10. "The obligation is one implied at common law." 43 Am. Jur. Public Utilities §22. "This duty exists independently of statutes . . . Statutes providing affirmatively therefor are merely declaratory of the common law". 73 C.J.S. Public Utilities §7.

3.

The Stock Yard Company's Regulation Is Illegal For Demanding Exclusive Patronage By Respondent And Others As A Condition To Furnishing Them Stockyard Services. Public Utilities May Not Demand Exclusive Patronage.

The Court of Appeals below[11] quoted approvingly this passage from the Tennessee Court's decision "upon the legality of a comparable situation" some years ago:

> "Furthermore, we fail to find anything in the Packers and Stockyards Act that requires defendant or his employer to transact all of their business of receiving, buying and selling livestock on complainant's premises, or from buying livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the act which requires * * * the defendants to do all their business with complainant * * *." *Nashville Union Stockyards* vs. *Grissim*, (153 Tenn. 225, 280 S.W. 1019).

A Tennessee stockyard sued to enjoin a commission man from going on the yard, charging he was doing things "hurtful" to the company's business by "diverting"[12] business from its stockyard so that the yard was "denied" the right to handle the shipments. The case was heard and decided on the pleadings[13]

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11. 241 F. 2d 197.

12. Denver's Regulation says the same, viz., that no market agency, dealer or person may "divert or attempt to divert" livestock from this market. (R. 11, 12. Petition for Certiorari, 2a. Opinion below, 241 F. 2d 194).

13. Like our own case, no fact hearing was found necessary to decide the question of validity or invalidity of the attempt as a matter of law upon the face thereof.

and dismissed. In other words, the attempt to bar the commission man from the Nashville stockyard because he did business elsewhere (as this Regulation attempts to do)[14] was held illegal as a matter of *law* upon its *face*. And our Court of Appeals below approved and held likewise.

In other words, the demand of exclusive patronage made by the Nashville Stockyard Company (public utility) by those it served (as a condition to serving them) was ruled illegal on its face as a matter of law. Our Court of Appeals below acknowledged itself as being in "accord" with the "persuasive words" of the Tennessee Court and quoted therefrom the passage above.[15]

It is well settled that public utilities may not demand exclusive patronage as a condition to rendering service. The public utility, Denver Stock Yard Company, may not do so. *Strathie* vs. *Buck County El. Co.* *P.U.R.* 1920-D, P. 290. *Union Light and Power Co.* *P.U.R.* 1932-B, P. 1. *State* vs. *Citizen's Tel. Co.* (S.C.) 39 S.E. 257. *Nacogdoches Light & P. Co.* vs. *Thomas* (Tex. C. A.) 138 S.W. 1080. *People* vs. *Pub. Service Com.* 148 N.Y. S. 583. *Coombs* vs. *Burk* (Cal. App.) 180 P. 59.

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14. Our Court of Appeals below called it an attempt by the Stock Yard Company to "exclude from its yards those persons who lawfully trod upon its economic toes". 241 F 2d 196.

15. 241 F. 2d 196-197.

4.

The Stock Yard Regulation Denying Service To Those Who Deal In The Country — A Collateral Matter — Is Illegal. Public Utilities May Not Refuse Service Because Of A Collateral Matter Not Related To The Service.

As previously shown (P. 6) this startling Regulation bars from the Denver stockyard all who, in the forbidden area:

1. Solicit any business for other markets or for sale at country points, or endeavor to secure customers to buy or sell elsewhere.
2. Divert livestock away from the Denver yard (otherwise "normally" coming thereto).
3. Interfere with the "normal flow" of livestock to the Denver yard.

The Regulation's effect is this:

> *All who do business at our yard must do no business in the country area forbidden (other than to route livestock to us). Conversely: stay out of the forbidden country area (other than to route livestock to us) or get off of our yard and stay off!*

That is an attempt by a public utility to refuse service because of a collateral matter — doing business elsewhere (in the country).

> "The decisions are generally in accord in holding that a public utility corporation cannot refuse to render the service which it is authorized by its charter to furnish, because of some collateral matter not related to that service." 43 Am. Jur. Public Utilities §23.

See also 73 C.J.S. Public Utilities § 77. 55 A.L.R. 771, note. *Garner* vs. *City or Auroro* (Neb.) 30 N.W.

2d 917. *Vandenberg* vs. *Kansas City Gas Co.* (Mo.) 105 S.W. 17. *Ashline* vs. *Pub. El. L. Co.* (Vt.) 44 A. 2d 164. *South Florida Railroad Co.* vs. *Rhoads* (Fla.) 5 So. 633. *Ten Broek* vs. *Miller* (Mich.) 216 N.W. 385, 55 A.L.R. 768. *Seaton Mtn. El. etc. Co.* vs. *Idaho Springs Inv. Co.* (Colo.) 111 P. 834. *Miller* vs. *Roswell Gas & E. Co.* (N.M.) 166 P. 1177. *State* vs. *Butte E. & P. Co.* (Mont.) 115 P. 44.

5.

The Regulation Is Monopolistic And, Therefore, Illegal.

> "Monopolies in trade or business in this country . . . are generally denounced as odious, intolerable, and contrary to public policy and common right. They are regarded as repugnant to the spirit of our government and institutions, and are frequently forbidden by constitutional as well as statutory enactment. Indeed, as the term is generally employed, injury to the public is implied from its use." 36 Am. Jur. Monopolies §3.

Monopolies are condemned by the *common* law everywhere as contrary to public policy, aside from statute. 36 Am. Jur. Monopolies §5. And an arrangement, if it so much as *tends* to control a given market, will be denounced as a monopoly. The *pace* at which it tends to monopolize is of no consequence.[16] Every *arrangement*, the tendency of which is to stifle or unduly restrict legitimate competition is unlawful at common law and by anti-trust statutes, whether or not successful.[17] Complete monopoly is not the test; only does it *tend* toward monopoly.[18]

And so, in recognition, the Sherman Anti-Trust Act provides:

> "Every person who shall monopolize, or *attempt* to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several

16. ". . . it is immaterial that the tendancy is a creeping one rather than one that proceeds at full gallop." *International Salt Co.* vs. *United States*, 332 U.S. 392. 68 S. Ct. 12, 15.

17. 36 Am. Jur. Monopolies §6.

18. Id. §13.

states, or with foreign nations, shall be deemed guilty of a misdemeanor . . ." 15 U.S.C. §2.

The receipt and handling of livestock at the Denver stockyard, a "posted" yard, and one of the "great national public utilities," constitutes interstate commerce. [19]

Look at this regulation: Its purpose is clearly revealed:

> **Monopoly.** To force all livestock sales by market agencies and dealers in Colorado (except the East 1/6th) to be made through the Denver Stockyard, or to gather tribute on them. Argument without end, that is its bald, bold purpose; to *capture*[20] the marketing of all livestock in Colorado (mostly) passing through the hands of those who may do any business on the Denver yard.

It is of no consequence that the Regulation does not attempt to blanket all livestock marketing *everywhere*. The Sherman Act prohibits monopolization of "any *part* of trade or commerce".[21] (If the Denver Company now prevails, will it extend the boundaries of the outside area forbidden to its customers so as to include Kansas? Or perhaps Arizona, New Mexico, Utah and Wyoming? Why not also Missouri, Texas and Ohio? Why not *all* of the United States?)

It is no answer that the market agencies and dealers are not barred from the country area involved, but only from the Denver stockyard if they *operate* in

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19. *Stafford* vs. *Wallace*, 42 S. Ct. 397.

20. *International Salt Co.* vs. *U.S.*, 332 U.S. 392, 68 S. Ct. 11, 15.

21. 15 U.S.C. §2. *Kobe, Inc.* vs. *Dempsey Pump Co.* (10th Cir.) 198 F. 2d 416, 423.

that country area. Freedom to operate in the country area cannot be foisted on the market agencies and dealers by the Stock Yard Company in *substitution* of their right to operate at the stockyard.[22] They, in law, have the right to operate both places. The Packers & Stockyards Act vouchsafes their right at the yard, making it the stockyard's duty to furnish stockyard services,[23] without regard to off-yard trading.

Monopolies are condemned by Colorado State law. A by-law of a farmers' grain association allowing members to sell their grain to a competitor *only* if they paid the association a penalty was held monopolistic and illegal.[24] The Colorado court said:

> "The tendency of the by-law to stifle competition is manifest." 176 P. 488.

See also *Campbell* vs. *People*, 72 Colo. 213, 210 P. 841 and *Johnson* vs. *People*, 72 Colo. 218, 210 P. 843, outlawing monopolies of plumbers and contractors. This Regulation tends to monopolize the marketing of livestock everywhere in the forbidden Colorado area by those who wish to deal at the Denver stockyard. For that monopolistic tendency, it is illegal and void.

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22. "Exclusion from an appropriate market or business opportunity is actionable notwithstanding substitute opportunities." *Gamco, Inc.* vs. *Providence Fruit & Produce Bldg.*, 1 Cir. 194 F. 2d 484. Cert. Den. 344 U.S. 817. 73 S. Ct. 11.

23. 7 U.S.C. §205.

24. *Burns vs. Wray Farmers Grain Co.* (Colo.) 176 P. 487 (1918). 65 Colo. 425. See also *Colorado Wheat Growers Association* vs. *Thede*, 80 Colo. 529, 253 P. 30.

6.

The Regulation Is Invalid On Its Face.

The Act requires this stockyard to furnish "stockyard services without discrimination". 7 U.S.C. §205. That makes it a "public utility".[25] Contrary to the right of public utilities to do so, its Regulation:

1. Demands *upon its face* exclusive patronage of those it serves.
2. Demands *upon its face* non-activity in the country area by those it serves (except to route their deals to Denver.)
3. Monopolizes and tends to monopolize *upon its face* the movement of all livestock handled in the forbidden country area by those it serves — requiring that they ship to Denver or stay off of the yard.

The Regulation, we submit, is clearly illegal upon its face.

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25. *Stafford* vs. *Wallace*, supra.

7.

The Regulation Being Illegal On Its Face, "Full Hearing" Required No Evidence.

Petitioner plays upon the words "full hearing", the Secretary being authorized in the Act to decide upon a regulation's invalidity "after a full hearing upon a complaint . . .". 7 U.S.C. §211. Petitioner claims lack of a full hearing.

But, again, look at the record:

— Respondent filed its Election to Rest, claiming the Regulation was void, *per se*. (R. 73).

— Petitioner countered with its "Motion to Dismiss" the complaint. (R. 74).

— The Department's Judicial Officer ruled. He upheld the Regulation. (R. 33).

Both parties at that point thus offered to settle for a decision on the Regulation upon its face. Neither can recede from that position now. And a "full hearing" was had on the question as a matter of law, thus:

— Oral arguments before a Hearing Examiner (previously). (R. 10).

— Briefs were submitted to him.

— The Examiner certified the proceeding to the Judicial Officer.

— Amicus Curaie filed briefs. (R. 11).

— The parties filed briefs.

— Oral arguments were finally made before the Judicial Officer April 30, 1956.

The court below said on this:

". . . It is fundamental to the law that the submission of evidence is not required to charac-

> terize 'a full hearing' where such evidence is immaterial to the issue to be decided."[26]

It might also have cited this court's expression on identical "full hearing" language in the Federal Communications Act[27] where evidence was ruled not to be involved — but a *waste* of time:

> "We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing." *United States* vs. *Storer Broadcasting Co.*, 76 S. Ct. 763, 772.

Respondent, by its "Election to Rest" submitted its case upon the Regulation's being valid or invalid upon its face. *Petitioner*, by its "Motion to Dismiss" did likewise. Both thus settled for a decision on the Regulation upon its *face*. Petitioner, by its Motion to Dismiss, *abandoned* and *waived* any earlier request for an oral hearing. In fact, it was glad, of course, for the Judicial Officer's decision which thereupon granted its Motion to Dismiss. And no matter how unhappy it now finds itself with the decision by the Circuit Court of Appeals, Petitioner is *bound* by its Motion to Dismiss and the submission of its case thereon.

Petitioner's argument for a full hearing would require evidence upon a Regulation which, for example, would bar from the Denver stockyards:

1. Redheaded men, or,
2. Residents of Chicago or San Francisco, or,

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26. Citing this court in *Akron, C. & Y. Ry. Co.* vs. *U. S.*, 261 U.S. 184, 43 S. Ct. 270

27. 47 U.S.C. §309.

3. Stockholders of General Motors Corporation, or,
4. Stockholders of American Tel. & Tel. Co., or,
5. Members of the Republican Party, or,
6. Members of the Methodist Church, etc., etc.[28]

or a regulation which would say that no one at the Denver stockyards should:

— Sell milk cows if he drank powdered milk.

— Sell beef cattle if he also sold fish or poultry.

— Sell sheep with unshorn wool if he also dealt in cotton.

— Sell draft animals if he drove a truck, or

— Sell hide-animals if he wore synthetic shoe soles.

The invalidity of all of the foregoing rules would be apparent and self-evident on their face. Evidence would be "a waste of time".

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28. The first four examples were cited by the Supreme Court in *S.E.C.* vs. *Ralston Purina Co.*, 346 U.S. 119. 73 S. Ct. 981, 984.

8.

Petitioner's Complaints Against The Decision Of The Court Of Appeals Are Without Merit.

Full Hearing. That has already been disposed of, Page 21. The Court of Appeals rightfully observed:

> "Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument. This was done in the instant case and constitutes a 'full hearing' for consideration of the limited contention made by the Petitioner in its complaint and by its election not to submit evidence." 241 F. 2d 196. Petition for Certiorari, 5a-6a.

But both sides submitted the Regulation upon its very face, viz., Respondent by its "Election to Rest"; Petitioner responding by its "Motion to Dismiss" the complaint. The *Morgan* case cited by Petitioner (P. 9) was simply upset by this court because of its weird procedure — the Secretary (who had taken office after the case was commenced and who heard none of it) made the decision in a proceeding conducted before another — his deputy (Rexford G. Tugwell). That was not full hearing. The other decisions cited are *rate* cases. We suppose, for the most part, rate cases require evidence. But, if a rate application showed upon its *face* as a matter of *law* that it was unwarranted, and then an "election to rest" and a response by "motion to dismiss" were filed, it would have to be decided without evidence. Taking evidence would be a "waste of time".[29]

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29. In the language of this court, *U.S.* vs. *Storer Broadcasting Company*, 76 S. Ct. 763, 772.

Unreasonableness Shown On Face. Petitioner now declares it was "prepared to show the evils at which this Regulation was aimed". But, prepared or not, Petitioner finally elected to *waive* that "preparation" and not to try to show anything by filing its "Motion to Dismiss" afte. Respondent had filed its "Election to Rest" upon the "evils" shown upon the face of the Regulation. In other words, both sides tested the "reasonableness" of the Regulation by the face thereof. The court below properly said the Regulation bears no reasonable "relationship to the duties required of the Stock Yard Company under . . . the Act."

No Hypothetical Facts Assumed By Court Of Appeals. The court below rightfully said that the Act required the market agencies (Respondent is one) to furnish stockyard services to customers at every yard where they operate. That was not hypothetical at all — but a true statement of law.[30] Then, reasoning, the Court of Appeals remarked also (of which Petitioner complains) that:

> ". . . by rendering . . . services . . . at one stockyard (the Denver yard) a marketing agency is prohibited (by the Regulation) from rendering . . . service . . . at another stockyard . . . (and, therefore) . . . the agency cannot perform its statutory duty in one regard or another." (Parentheses added.) 241 F. 2d 196. Petition for Certiorari 6a.

That was not hypothetical, but true reasoning. Market agencies admitted to the Denver yard must,

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30. "It shall be the duty of every stockyard owner and market agency to furnish . . . stockyard services." 7 U.S.C. §205.

under the Regulation, give up operations at all *other* yards (respecting Colorado livestock); conversely, market agencies admitted to other yards must give up operations at the *Denver* yard (respecting Colorado livestock), and, thus, they cannot perform their "statutory duty" in one regard or another, viz., at the Denver yard or at the other yards, as the case may be.

No Discretion Of The Secretary Invaded. Petitioner argues for the Secretary's discretion. But the Secretary has made no regulation. Petitioner (the Stock Yard Company) made it. The Secretary has not acted in a discretionary way. His only part was to hear a complaint against the Regulation. Had he *made* or *prescribed* the regulation, the argument might be closer to the mark. But he did not.

Petitioner also says the power of the Court of Appeals on review under the Hobbs Act (5 U.S.C. §1032) was to "enjoin, set aside, suspend (in whole or in part) or determine the validity of" the Secretary's decision — and no more; that it was the Secretary's function to prescribe the consequences, citing 7 U.S.C. §211. But this regulation was void *in toto* and *per se*. It collapsed of its own illegal weight. It was a *nullity*. As such, it could not be enforced at all. The Court of Appeals thus rightfully ordered its non-enforcement by directing the Secretary to order the Stock Yard Company to desist in trying to enforce it.

Petitioner would accord weight *inviolate* to the Judicial Officer's decision but none whatever to that of the Judges of the court below, pitilessly characterizing the latter as "knowing nothing of the problems

involved". (P. 13). But this case was presented, heard and decided throughout solely upon the face of the Regulation — a matter of law. Petitioner's argument would lead, then, to the shocking result that an employee (Judicial Officer) of the Department of Agriculture should be regarded as better qualified to decide upon the *law* than the learned Judges of the Court of Appeals.

Now, if we are to indulge in assumptions over qualifications to decide, by law, a Regulation over livestock and stockyards, etc., let us not overlook the Judges themselves who decided the case below,[31] whose lives and experiences have had their setting in the Great West —

> (where the) "flow of livestock (starts) from the ranges and farms of the West and the Southwest through the great stockyards . . . of that region". (Parentheses added). *Stafford* vs. *Wallace*, 42 S. Ct. 397, 401.

No Adverse Effect On Administration Of Act. Petitioner argues that the decision below will adversely affect administration of the Act. But this Regulation was not *issued* or *prescribed* by the Secretary but by the Stock Yard Company, itself. And had it been valid, the Secretary or Department of Agriculture would not be the ones to *enforce* or *administer* it. The Stock Yard Company would.

Were a regulation of the Secretary (and his administrative authority to regulate, enforce and *admin-*

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31. Hon. Walter A. Huxman, Kansas.
Hon. John C. Pickett, Wyoming.
Hon. David T. Lewis, Utah.

ister same) involved, the argument would be nearer the mark. But here is a Regulation by a stockyard itself. It is either valid or invalid on its face. If invalid, it falls of its own illegal weight and amounts to nothing, as the Court of Appeals ruled, and cannot be enforced by the stockyard. The result has no connection with administration of the Packers and Stockyards Act whatever.

CONCLUSION

A single question, only, is presented: the invalidity of this Regulation upon its *face* as a matter of *law*. That law question evolved definitely as the sole and only question in the case by the joint action of the parties: *Respondent's* "Election to Rest" on the invalidity as appearing by the face of the Regulation as a matter of law, and *Petitioner's* response in the form of its "Motion to Dismiss" the complaint for Respondent's "election not to offer proof". (R. 73, 74). The case was left and submitted for decision in that posture. The Secretary's ruling at that point upheld the Regulation, the Court of Appeals reversed.

Respondent submits:

1. The Stock Yard Company is a public utility.[32]

2. Its Regulation, on its face, demands exclusive patronage and also non-activity in the country area, by its customers (except to ship to Denver), as a condition to "furnishing them stockyard services". Such demands by public utilities are illegal[33] and the Packers and Stockyards Act 1921 will not permit them, for it makes it "the duty of every stockyard . . . to furnish . . . without discrimination . . . stockyard services". 7 U.S.C. §205. As the Court of Appeals said in quoting the "persuasive" Tennessee Supreme Court:

> "Furthermore, we fail to find anything in the Packers and Stockyards Act that requires defendent or his employer to transact all of their business of receiving, buying and selling live-

32. *Stafford* vs. *Wallace*, supra.

33. The Court of Appeals observed that the stockyard had no right to exclude those who "lawfully trod upon its economic toes". 241 F. 2d 196.

> stock on complainant's premises, or from buying livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the Act which requires * * * the defendants, to do all their business with complainant, * * *." *Nashville Union Stockyards* vs. *Grissim*, supra (153 Tenn. 225. 280 S.W. 1019).

3. The Regulation is monopolistic — by the common law, the Sherman Act (15 U.S.C. §2) and Colorado State law.

4. The Regulation is void on its face as a matter of law. The parties each submitted the case on that single proposition — Respondent by its "Election to Rest", Petitioner by its "Motion to Dismiss". The Judicial Officer then decided on that question alone. The Court of Appeals did likewise. No evidence was necessary but would have "been a waste of time",[34] and the Appeals Court properly held the case was thus to be decided "upon the issues of law after according the parties the right of argument . . . and (this) constitutes 'full hearing' for consideration of the limited contention made". (Parentheses added). 241 F. 2d 196.

5. The foregoing propositions, viz., the demand of *exclusive* patronage and *non*-activity in the forbidden area, and *monopoly* — each of them illegal and shown upon the Regulation's face — were presented

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34. *United States* vs. *Storer Broadcasting Co.*, 76 S. Ct. 763, 772.

and argued at length in the Court of Appeals below. Its decision outlawing the Regulation was in accord.

The judgment of the Court of Appeals declaring the Regulation to be invalid upon its face as a matter of law and that the Stock Yard Company shall not be permitted to enforce it is correct. The Petition for Writ of Certiorari must be denied.

May, 1957.

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